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No. 95-1275

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JENNIE R. LEFEVRE, SALLY M. HILL,
FREDERICK L. RADA AND MARY CHRISTINA VELDMAN,
Petitioners,

v.

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

I.

This case raises the fundamental question whether, when an agency admits that, in the exercise of its congressionally-mandated function, it mistakenly relied on evidence that contradicts rather than supports its decision, may a reviewing court search the administrative record to find evidence not relied on by the agency, re-weigh all the evidence, and uphold the agency's decision based on the court's assessment of the evidence. The principles enunciated by this Court in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) ("*Chenery II*"), prohibit such an intrusion into the administrative domain. Yet, as petitioners demonstrate in their petition, the Federal Circuit has engaged in such an improper practice in this case and

others. Accordingly, review by this Court is fully justified. Nothing in the Secretary's Brief in Opposition undermines this conclusion.

A. The Secretary argues that the court below complied with the *Chenery* doctrine in affirming the Secretary's denial of a positive association between exposure to herbicide agents and prostate cancer "[b]ecause the court of appeals was able to discern the path taken in the Secretary's decision." Brief for the Respondent in Opposition 10 ("Opp."). At the center of the Secretary's path was his finding that "[t]here are statistically significant occupational studies which show no association between prostate cancer and herbicide exposure (e.g., Fingerhut . . .; Manz . . .; Saracci . . .)." Pet. App. 31a. According to the Secretary, the court below correctly discerned that the Secretary, in making this finding, in fact relied on the Ronco and Wiklund studies cited by the court (though not by the Secretary), but merely "miscited" to the Fingerhut, Manz, and Saracci studies. The Secretary further argues that his use of "e.g." in his "miscitation" somehow permits the court to add to the Secretary's citation.

The Secretary's attempt to reconcile the Federal Circuit's reasoning with the *Chenery* doctrine is unavailing. Although *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974) ("*Bowman*"), on which the Secretary relies, Opp. 10, 11, permits a court to "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," nothing in *Bowman* weakens the requirement that a court must uphold an agency's decision only upon the agency's discernible rationale. *Bowman* does not permit a court to engage in rank speculation as to an agency's rationale nor to supply the court's own. Here, it cannot reasonably be contended that the basis on which the court below upheld the Secretary's decision was discernible from that decision.

As the Secretary concedes, the *only* studies he cited in support of his principal finding—that statistically signifi-

cant studies show no association—in fact contradict that finding.[1] Thus, the most reasonably discernible rationale is wholly unsupported and arbitrary. If by the use of "e.g.," the Secretary meant that there were additional sources that did not support his principal finding, that is no doubt correct, but certainly it does not advance the validity of his underlying conclusion or support the court of appeals' willingness to blink at his error. The court's inference—that the Secretary intended to rely on studies he did not cite and intended not to rely on the studies he did cite—is not an analytic path reasonably discernible from the Secretary's decision and thus is not a path which a court may properly ascribe to the Secretary.

Not only is the basis for the Secretary's decision missing, it requires even greater speculation to assume that the Secretary would reach the same conclusion on remand. Perhaps the Secretary would not give much weight to the Ronco and Wiklund studies, which would explain why he failed to rely on them in the first place.[2] Even if he would follow the court's lead and cite to Ronco and Wiklund, he may well decide that transferring the Fingerhut, Manz, and Saracci studies to the side supporting an association would "tip the balance" in favor of an association, or at least would level the scales, which is all that is required

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[1] The Secretary attempts to minimize this finding by stating that it was merely "one of" the bases for his decision. Opp. 8, 9. But, it is indisputable from the face of the Secretary's ruling that this finding is the *only* finding that supports his conclusion that there is *no* association between prostate cancer and exposure to herbicides. *See* Pet. App. 31a-32a. The finding is thus not merely "one of" the bases supporting the Secretary's decision, it is the only basis.

[2] That the Ronco and Wiklund studies may carry little weight with respect to prostate cancer is also suggested by the fact that the recent NAS Report referred to by the Secretary makes no mention of those studies in its discussion of prostate cancer, even though it does discuss the Fingersut, Manz, Saracci and Morrison studies that the Secretary had cited as supporting a positive association for prostate cancer. *See* Opp. 9a.

to establish a presumption. In short, there is simply no way to discern, on judicial review, the path the Secretary took initially and, *a fortiori,* no way to know how the Secretary would decide the matter *de novo* on remand. The Federal Circuit thus did not discern the Secretary's path, it forged its own.

The nature of the *Chenery* violation in this case is particularly dangerous to the administrative scheme. The court below made a policy determination—whether a presumption is warranted—based on its own assessment and balancing of the evidence in the administrative record. This weighing process lies at the heart of administrative procedure. Regardless of whether courts should substitute their judgment for that of agencies with respect to *legal* principles, it is vital that courts refrain from resolving the type of policy and evidentiary uncertainties that arose in this case. Protection of the administrative function requires that such uncertainties be resolved only by the institutionally proper and presumably expert agency. Accordingly, the Secretary, not the court below, should reconsider the evidence in the record and make the appropriate determination.

B. As petitioners showed in their petition, Pet. 19-21, the Federal Circuit's usurpation of agency discretion is not unique to this case, but has occurred in *at least* two other cases. See *Ward* v. *Merit Sys. Protection Bd.*, 981 F.2d 521 (Fed. Cir. 1992); *Sealed Air Corp.* v. *United States ITC,* 645 F.2d 976 (C.C.P.A. 1981).[3] Conceding the erroneousness of these decisions, the Secretary attempts to dismiss them as "aberrational." Opp. 13. While one case may be aberrational, three suggests a trend that likely

[3] The Secretary's observation that *Sealed Air Corp.* was decided by the Federal Circuit's "predecessor," Opp. 13, is meaningless. The decisions of the United States Court of Customs and Patent Appeals rendered prior to and including September 30, 1982, are as binding in the Federal Circuit as decisions by the Federal Circuit itself. *See South Corp.* v. *United States,* 690 F.2d 1368, 1369-70 (Fed. Cir. 1982) (en banc).

will be repeated unless this Court intervenes. At a minimum, the Court should not sit by idly and allow one circuit to decide for itself when it will be bound by *Chenery* and when it will not. The arbitrariness inherent in the pattern of decisionmaking by the Federal Circuit cries out for elimination by this Court, which is the only body that can now enforce the mandate of *Chenery* in the Federal Circuit.

C. In attempting to minimize the difference between the Federal Circuit's approach and that taken in other circuits, the Secretary fails to appreciate the egregious nature of the Federal Circuit's error. The case discussed by the Secretary, Opp. 12, *American Legion* v. *Derwinski*, 54 F.3d 789 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 697 (1996), stands merely for the proposition that a court may uphold an agency's decision in which the agency cited to the wrong legal standard if it is clear, from the decision as a whole, that the agency in fact applied the correct legal standard. As demonstrated above, however, the Secretary's reasoning in this case was anything but clear and, consequently, *American Legion* is not analogous to this case.

Moreover, the identification of a legal standard, as was done in *American Legion*, is well within a court's competence. Here, by contrast, the court's evidentiary assessment and policy determination represents the type of discretionary judgment that Congress reserved to the Secretary. Furthermore, contrary to the Secretary's suggestion of circuit uniformity, other circuits steadfastly refuse to ignore *Chenery* and re-weigh evidence. Instead, they remand agency decisions that are not supported by the evidentiary basis articulated by the agency. See, *e.g.*, *Rodriguez-Barajas* v. *INS*, 992 F.2d 94, 98 (7th Cir. 1993); *Chemical Mfrs. Ass'n* v. *EPA*, 899 F.2d 344, 360 (5th Cir. 1990); *Pennzoil Co.* v. *FERC*, 789 F.2d 1128, 1136 & n.21 (5th Cir. 1986); *Owens* v. *Heckler*, 748 F.2d 1511, 1516 (11th Cir. 1984). Accordingly, the

Federal Circuit's approach is plainly inconsistent with the approach taken in other circuits.

D. Finally, the Secretary argues that, notwithstanding the errors in the Secretary's decision, a remand is unnecessary in light of a new report issued by the NAS (the "Second NAS Report"). Opp. 13-14. The Secretary speculates—without making any commitment to do so—that "there is every reason to believe" that he will correct his errors and reconsider whether prostate cancer should be service-connected in light of the Second NAS Report. The Secretary's self-serving speculation about what he might do, but has made no commitment to do, does not eliminate the need for this Court's review, for at least two reasons.

First, this case presents the Court with an opportunity to correct the Federal Circuit's fundamental departure from the *Chenery* doctrine. The Federal Circuit's practice will remain uncorrected without this Court's guidance, regardless of whether the Secretary ultimately decides to correct his errors.

Second, in responding to the petition, the Secretary has had a full opportunity to inform this Court that he will *in fact* revisit the issue of the association between prostate cancer and herbicide-agent exposure. The Secretary has expressly declined to make such a commitment. In the absence of such a commitment, the possibility that the Secretary might correct his error in the future should be accorded no weight. It is always the case that an agency might change its regulations in the future but that has never been a ground for letting erroneous rules stand. This is especially true where, as here, the Secretary throughout this litigation—including in his opposition to the petition—has staunchly resisted reconsidering his ruling.

Nor is there any risk of mootness in this case. The Agent Orange Act provides that benefits for veterans and their survivors awarded on the basis of presumptive serv-

ice connection shall continue even if the Secretary subsequently determines that a presumption is not warranted. See 38 U.S.C. § 1116(d). Thus, if the Secretary had granted a presumption for prostate cancer in the ruling at issue, petitioners would continue to receive benefits indefinitely even if the Secretary were to deny a presumption based on the Second NAS Report. Alternatively, even if the Secretary were to grant a presumption based on the Second NAS Report, the petitioners would still be harmed by the failure to grant a presumption in the first ruling because the Secretary would be unlikely to award benefits retroactively. Accordingly, regardless of any second decision by the Secretary during the pendency of this case, petitioners have every reason fully to litigate the issues raised in their petition. To avoid the risk that petitioners would be whipsawed by such a decision, the Court at a minimum should remand *this proceeding* to the court of appeals to be remanded to the Secretary to be reconsidered in light of the intervening study. It should not simply leave petitioners without relief.

II.

A. The second question raised in the petition is whether the Agent Orange Act permits the Secretary to ignore evidence of a biologically plausible mechanism between exposure to dioxin and hepatobiliary and nasal/nasopharyngeal ("nasal") cancers simply because dioxin is not, in and of itself, an herbicide. Apparently recognizing that he could not properly ignore such evidence, the Secretary has reformulated the question in a way that assumes away the question decided below and properly raised by petitioners. The Secretary now argues that the court below did not hold that the Secretary had no duty to "consider" the evidence, but only that he had no duty to "discuss" it. This is absurd.

In the Federal Circuit, petitioners argued that the Secretary failed to give any consideration whatsoever to "the toxicological evidence of biologic plausibility with respect

to both nasal and hepatobiliary cancers." Pet. Br. to Fed. Cir. 37-38. In response, the Secretary asserted that he was not required to consider such evidence because the evidence involved exposure to dioxin and not to herbicides themselves. Resp. Br. to Fed. Cir. 47-48. Contrary to the Secretary's present contention, the Federal Circuit held that the Secretary had no duty to *consider* biologic plausibility evidence of dioxin exposure. Pet. App. 19a-20a. Petitioners challenged that ruling in their petition to this Court on the ground that it violates the plain language of the Agent Orange Act, which requires the Secretary to consider "sound medical and scientific evidence" in determining whether a "positive association" exists between "the exposure of humans to an *herbicide agent*" and "the occurrence of a disease in humans." 38 U.S.C. § 1116(b)(1) (emphasis added).

Now, the Secretary stresses a distinction between a duty to "discuss" and to "consider" evidence. He implies, without specifically asserting, that in fact he did *consider* the evidence of biologic plausibility for nasal and hepatobiliary cancer, but that he had no duty to *discuss* his consideration in his ruling.[4] Besides not being the issue at hand, it is difficult to understand the basis for such a distinction in this context. Indeed, neither the Secretary nor the Federal Circuit made such a distinction below, employing the terms "consider," "discuss" and "address" interchangeably. See Resp. Br. to Fed. Cir. 45-48; Pet. App. 19a. Bedrock principles of agency law require

[4] Contrary to the suggestion that he considered such evidence, the Secretary practically concedes that he did not when he states that "[t]he Secretary based his determination regarding liver and nose cancers on the Academy's survey of the existing *epidemiological* studies, which, in the aggregate, did not support a positive association between exposure to herbicides and those cancers." Opp. 17 (emphasis added). The studies the Secretary erroneously failed to consider were not epidemiological studies, but rather toxicological studies involving laboratory animals. As the Secretary acknowledges, there is "extensive evidence . . . that dioxin causes cancer in laboratory animals." *Id.* at 6 (citing Pet. App. 7a).

an agency to articulate the basis for its decision in order to ensure rational decisionmaking and to afford meaningful judicial review. In addition, the specific language of the Agent Orange Act requires the Secretary to "take into account" the NAS reports and all other sound medical and scientific evidence, 38 U.S.C. § 1116(b)(2), and to give "an explanation of the scientific basis" for any decision to deny presumptive service connection for any disease, *id.* § 1116(c)(1)(B). These principles lead inescapably to the conclusion that the Secretary must at least acknowledge in his ruling the evidence he is required to consider. Here, however, in the context of hepatobiliary or nasal cancer, the Secertary did not mention or "discuss" and, therefore, presumably did not consider the toxicological evidence of dioxin exposure.

B. Perhaps realizing the fallacy of this distinction, which is not even at issue, the Secretary argues that, even if he failed to consider the toxicological evidence of biologic plausibility, he was not required to because, as he argued below, that evidence involves exposure to dioxin, not to herbicides. Opp. 16 n.6. The Secretary points to language in the Act, *id.* ("herbicide agent containing dioxin") (quoting 38 U.S.C. § 1116(a)(3)), that suggests that dioxin is not itself an "herbicide agent." However, as petitioners demonstrate in their petition, the *definition* section of the Agent Orange Act defines an "herbicide agent" as "a chemical in an herbicide." 38 U.S.C. § 1116(a)(4). It is beyond cavil that herbicides used in Vietnam, such as Agent Orange, did contain dioxin, and that dioxin is a chemical. Thus, dioxin is indisputably an "herbicide agent" within the definition of the Act, and the Secretary erroneously failed to consider evidence involving exposure thereto.

C. Finally, the Secretary characterizes the scope of petitioners' challenge to his decision with respect to hepatobiliary and nasal cancer as "narrow" and "factbound." Opp. 17. Petitioners contend that the Secretary ignored

the plain language of the Agent Orange Act, and that the Federal Circuit allowed him to do so—issues that are neither narrow, nor factbound.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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